(2)

No. 97-1668

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1997

NICK J. MILETI,

Petitioner,

v.

MARCIA N. COLE,
REPRESENTATIVE OF THE ESTATE OF
JOSEPH E. COLE,

Respondent.

**Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit**

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In 1983, Respondent Nick J. Mileti formed a corporation known as Streamers International Distributors to purchase and distribute a film known as *Streamers*, which he had co-produced with Robert Altman. Joseph E. Cole [1] bought stock in the Streamers company and loaned it $475,000. To fund these transactions, Cole borrowed money from the Equitable Bank of Baltimore, Maryland.

On September 4, 1984, Mileti and Cole entered into the surety agreement, under which Mileti assumed responsibility for discharging Cole's obligation to Equitable Bank. In exchange, Cole transferred to Mileti his Streamers stock and the $475,000 promissory notes he had received from the company. Paragraph 8 of the surety agreement designated California law as controlling in the construction and enforcement of the parties' contract.

Mileti never fulfilled his obligation under the surety agreement to repay the amounts owed to Equitable Bank, forcing Cole to do so himself. In 1994, Cole filed this diversity action in the United States District Court for the Northern District Ohio to recoup these amounts from Mileti. The parties consented to the jurisdiction of a United States magistrate, who eventually awarded Cole $988,861.89 in

---

1 Mr. Cole, the original plaintiff in this lawsuit, died during its pendency in the district court. On January 8, 1995, Mr. Cole's widow, Marcia N. Cole, was substituted as the plaintiff pursuant to Rule 25 of the Federal Rules of Civil Procedure. Mrs. Cole is the respondent in these proceedings.

damages and $470,728.66 in prejudgment interest under his claim for breach of the surety agreement.

Mileti appealed the judgment on two separate grounds. A citizen of California, Mileti argued that the district court lacked personal jurisdiction to adjudicate claims asserted against him in Ohio.

Mileti also found error in the magistrate's refusal to bar Cole's recovery under Cal. Civ. P. Code § 337, the California statute of limitations that requires claimants to file suit for breach of contract within four years of executing the instrument under dispute. *See* CAL. CIV. P. CODE § 337 (West 1923). Mileti contended that the surety agreement's choice-of-law provision mandated enforcement of § 337 over the corresponding Ohio provision applied by the magistrate, Ohio Rev. Code § 2305.06, which creates a fifteen-year deadline for bringing such causes of action. *See* OHIO REV. CODE ANN. § 2305.06 (Banks-Baldwin 1993).

The Sixth Circuit Court of Appeals affirmed the judgment entered in Cole's favor. Mileti now petitions this Court for a writ of certiorari.

ARGUMENT

1. MILETI HAS FAILED TO PRESENT ANY VIABLE REASON FOR THE COURT TO REVIEW THE SIXTH CIRCUIT'S DETERMINATION OF THE APPLICABLE STATUTE OF LIMITATIONS.

A. THE OHIO STATUTE OF LIMITATIONS APPLIES TO CLAIMS PROSECUTED IN THE STATE.

The Court of Appeals properly looked to the Ohio statute of limitations in determining the timeliness of Cole's claim for breach of contract. "A federal court sitting in diversity jurisdiction applies the choice of law rules of the forum state." *Miller v. State Farm Mut. Auto. Ins.*, 87 F.3d 822, 824 (6th Cir. 1996).

Cole brought this action in Ohio, which enforces its own limitations period in all litigation prosecuted within its borders. *Charash v. Oberlin College*, 14 F.3d 291, 299 (6th Cir. 1994); *Mahalsky v. Salem Tool Co.*, 461 F.2d 581, 584 (6th Cir. 1972). The Sixth Circuit followed this straightforward rule in affirming application of Ohio's statute of limitations.

The surety agreement's choice-of-law provision did not require enforcement of the California statute of limitations, as Mileti has argued. In diversity litigation, the "procedural law of the forum" controls. *Spence v. Miles Lab., Inc.*, 37 F.3d 1185, 1188 (6th Cir. 1994). Choice-of-law provisions, however, "incorporate only substantive law and not

procedural law." *Phelps v. McClellan*, 30 F.3d 658, 662 (6th Cir. 1994).

As California law itself acknowledges,

> [i]t is ... well established ... that the statute of limitations is procedural. It affects the remedy only; it does not impair the substantive right or obligation.

Travelers Indem. Co. v. Bell, 213 Cal App. 2d 541, 547, 29 Cal. Rptr. 67, 70 (1963); *see also Koch v. Rodlin Enter.*, Inc., 223 Cal App. 3d 1591, 273 Cal Rptr. 438 (1990).

This principle renders the choice-of-law provision irrelevant in determining Cole's deadline for filing suit. The Sixth Circuit correctly applied the statute of limitations of Ohio, the forum state in this diversity action.

B. THE REPEAL OF OHIO REV. CODE § 2305.20 INVALIDATES MILETI'S INVOCATION OF THE CALIFORNIA STATUTE OF LIMITATIONS.

Mileti, however, argues that a different standard applies when claims brought in Ohio actually accrued in another state that has a shorter limitations period. According to him, Ohio abandons its own statute in such cases in favor of the more restrictive limitations period enforced in the other jurisdiction. *See* Petitioner's Brief, pp. 14-17. The California statute of limitations trumps Ohio's under this purported rule and requires dismissal of Cole's claim.

The Sixth Circuit would have had to turn back the clock by more than three decades in order to accept the proposition of law articulated by Mileti. Under former Ohio Rev. Code § 2305.20,

> [i]f the laws of any state or country where a cause of action arose limit the time for the commencement of the action to lesser number of years than do the statutes of this state in like causes of action then said causes of action shall be barred in this state at the expiration of said lesser number of years.

OHIO REV. CODE ANN. § 2305.20 (Banks-Baldwin 1917).

The Ohio Legislature repealed § 2305.20 as of November 11, 1965. *Loughan v. Firestone Tire & Rubber Co.*, 624 F.2d 726, 728 (5th Cir. 1980). In the wake of this development, Ohio litigants can no longer challenge the timeliness of claims under the statute of limitations from other jurisdictions. *See id.*

In *Associates Fin. Serv./APEX v. Brogan*, No. 15-CA-90, 1990 WL 163829 (Ohio Ct. App. Oct. 22, 1990), the plaintiff sued in Ohio to enforce a promissory note. The note explicitly invoked the laws of Colorado, the state where the plaintiff's claims apparently arose. *Id.* at *1. While the litigation began well within the Ohio limitations period, the Colorado statute had already lapsed. *Id.* The repeal of § 2305.20 doomed the defendant's attempt to secure dismissal on this basis:

> For many years ... [§ 2305.20] provided that if the laws of a state where a cause of action arose barred an action, the action should be barred in Ohio. *Were the statute still the law*, the defendant's motion might well be granted.

Id. (emphasis added). Since § 2305.20 no longer applied, the defendant in *Brogan* remained liable, regardless of whether the Colorado statute of limitations would have barred the lawsuit.

Notwithstanding the repeal of § 2305.20, Mileti argues that Ohio's "conflicts-of-laws common law rule" requires enforcement of the limitations period from elsewhere under the identical circumstances prescribed by the former statute. Petitioner's Brief, p. 16. Mileti cites *Pinney v. Cummings*, 26 Ohio St. 46 (1875) as the seminal authority for this alleged principle. *Id.*, pp. 14-16.

The Ohio legislature, however, first enacted § 2305.20 (albeit under a different name) in *1846*, almost forty years before *Pinney*. *Hilliard v. Pennsylvania R. Co.*, 73 F.2d 473, 475 (6th Cir. 1934), *cert. denied*, 294 U.S. 721 (1935). The state Supreme Court did not articulate some "common law rule" in rendering this decision; it was instead merely enforcing the statute, which remained in effect at the time but had became inoperative long before the current lawsuit commenced.

Howard v. Allen, 30 Ohio St. 2d 130, 283 N.E.2d 167, *appeal dis'd*, 409 U.S. 908 (1972), did not revive § 2305.20,

as Mileti argues. The 1972 decision addresses the scope of Ohio Rev. Code § 2305.19, which gives plaintiffs one year to refile a claim after dismissal "otherwise than upon the merits," even if the statute of limitations lapsed during that 12-month period. *Id.* at 132, 169; *see* OHIO REV. CODE ANN. §2305.19 (Banks-Baldwin 1953). *Howard* permits invocation of § 2305.19 only by parties who originally filed suit in Ohio -- if the plaintiffs first filed their action in another state, where it was dismissed, they could not take advantage of the one-year savings statute by reasserting the same claims in Ohio. *Id.* at 169-70, 133-35.

Howard in no way considers the applicability of a foreign statute of limitations in Ohio litigation. To the extent the Supreme Court touched upon this issue, its discussion had no bearing on the ultimate outcome of the case.

Dicta of this nature lack any "binding effect" in subsequent lawsuits. *Cosgrove v. Williamsburg of Cincinnati Management Co., Inc.*, 70 Ohio St. 3d 281, 284, 638 N.E.2d 991, 993 (1994). Neither *Howard* nor any other authority establishes a "common law rule" that justifies Mileti's reliance upon the California statute of limitations.

C. THE SIXTH CIRCUIT'S DETERMINATION OF THE APPLICABLE STATUTE OF LIMITATIONS INVOLVES AN ISSUE OF STATE LAW THAT DOES NOT WARRANT THE COURT'S REVIEW.

The black-letter law of Ohio remains clear -- even if the foreign limitations

> period has expired, suit may [be] brought and the claim litigated at the forum if the local time period has not elapsed.

16 OHIO JUR. 3d Conflicts of Laws § 51 at 104 (1979). Mileti has no legitimate grounds to attack the Sixth Circuit's adherence to this rule.

Even had the court of appeals erred in making this ruling, the limitations question still would not present an appropriate question for this Court's review. "A petition for a writ of certiorari will be granted only for compelling reasons." SUP. C. R. 10(a).

This standard does not ordinarily justify the Court's consideration of "state law" issues. *Pierson v. Ray*, 386 U.S. 547, 558, n. 12 (1967). The Court has a "settled and firm policy of deferring" to the circuit courts with respect to such matters. *Bowne v. Massachusetts*, 487 U.S. 879, 908 (1988).[2] By refusing to pass upon state-law rulings, the Court preserves "its limited resources in the exercise of its discretionary jurisdiction." *Salve Regina College v. Russell*, 499 U.S. 225, 235, n. 3 (1991).

Exceptions arise only under extreme circumstances, such as when the circuit court's interpretation of state law "flatly contradict[s]" the express terms of an applicable state statute.

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2 *See also, McMillian v. Monroe Cty.*, ___ U.S. ___, 117 S.Ct. 1734, 1737 (1997); *Butner v. United States*, 440 U.S. 48, 57-58 (1979).

Leavitt v. Jane, 518 U.S. 137, 138 (1996). Only such "blatant federal-court nullification of state law" will warrant the grant of certiorari to address questions of state law. *See id.* at 145.

Mileti focuses upon a relatively narrow point of Ohio conflicts law in contesting the Sixth Circuit's resolution of the limitations issue. His argument neither raises constitutional questions nor implicates federal law in any way.

The Court of Appeals cogently explained its reasons for holding that the Ohio statute applied instead of California's. 133 F.3d at 436-37. While Mileti contests the correctness of this determination, he cannot seriously accuse the appeals court of defying indisputable precedent or otherwise flouting jurisprudential norms in making its decision.

The Sixth Circuit did not engage in "blatant ... nullification of state law" in rejecting Mileti's arguments concerning the controlling limitations period. Even had its ruling ultimately proved wrong, Mileti would have still lacked viable grounds to obtain a writ of certiorari from this Court.

2. MILETI HAS FAILED TO PRESENT ANY VIABLE REASON FOR THE COURT TO REVIEW THE SIXTH CIRCUIT'S RULING ON THE ISSUE OF PERSONAL JURISDICTION.

A. MILETI'S ARGUMENTS REGARDING PERSONAL JURISDICTION RELATE SOLELY TO THE PARTICULAR FACTS OF THIS CASE.

In contesting the determination of personal jurisdiction, Mileti does not accuse the Sixth Circuit of openly repudiating

the due process rules that govern such matters. Nor does he suggest that the appeals court indulged in some arbitrary flight from prevailing doctrine in affirming Cole's right to sue in Ohio. Mileti's petition points to no conflict between the Sixth Circuit's test for finding personal jurisdiction and the corresponding rules from other circuits.

The parties do not dispute the essential contours of the constitutional framework for assessing such matters. Mileti instead charges the Sixth Circuit only with misapplying these standards -- according to him, the particular circumstances underlying Cole's claims did not warrant a finding of personal jurisdiction. *See Petitioner's Brief*, pp. 8-11.

Commentators have recognized the "manifest impossibility" of granting certiorari "whenever there is any possibility that the lower court was wrong." 16B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper FEDERAL PRACTICE AND PROCEDURE § 4004.1 at 34 (1996). Practical considerations preclude the Court from "function[ing] as an ordinary appellate court concerned with achieving justice in individuals cases." *Id.* at 25. It has itself long acknowledged the necessity of denying

> the writ of certiorari except in cases involving principles the settlement of which is of importance to the public *as distinguished from that of the parties*, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts.

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 392-93 (1923) (emphasis added).

An alleged violation of Mileti's constitutional rights (or those of any other citizen) cannot be trivialized. No court would abide or endorse the blatant deprivation of due process.

Mileti, however, cannot ascribe any transcendent legal significance to his arguments regarding personal jurisdiction. Reviewing the Sixth Circuit's treatment of this issue would serve no purpose that extends beyond this singular lawsuit. Certiorari remains unavailable under these circumstances.

B. THE SIXTH CIRCUIT CORRECTLY HELD THAT EXERCISING PERSONAL JURISDICTION OVER MILETI COMPORTED WITH THE REQUIREMENTS OF DUE PROCESS.

Whatever the import of its decision, the Sixth Circuit correctly rejected Mileti's challenge to personal jurisdiction. Defendants become amenable to litigation in a particular forum if they have sufficient "minimum contacts" with that state. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). This due-process standard requires a meaningful nexus between the forum state and the defendant's voluntary, affirmative conduct. *Burger King Corp. v. Rudzewicz*, 471 U.S. 482, 474-75 (1985). Where "minimum contacts" exist, the defendant could have "reasonably anticipate[d] being haled into court" in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The Sixth Circuit has established a three-part test to determine whether "minimum contacts" permit the exercise of personal jurisdiction:

1) The defendant must have *purposefully availed* itself of the privilege of acting in the forum state.

2) The plaintiff's claims must *arise* from the defendant's activity in the forum.

3) The exercise of personal jurisdiction must be *fair and reasonable*.

See e.g. Aristech Chemical Int'l Ltd. v. Acrylic Fabricators Ltd., 138 F.3d 624, 627 (6th Cir. 1998), *citing Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968).

The *purposeful availment* "concept is an expansive one." *Gordy v. Daily News, L.P.*, 95 F.3d 829, 832 (9th Cir. 1996). It encompasses situations where a nonresident defendant has not physically entered the state in question. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264 (6th Cir. 1996). If the defendants direct mail and telephone calls to a party in the forum in negotiating and performing a contract, they have purposefully availed themselves of acting in that state. *See e.g. id.* at 1263-65.

Cole lived in Ohio at all times pertinent to this lawsuit. *Id.* The parties negotiated their surety agreement in telephone calls and correspondence to and from that state. *Id.* Mileti sent a signed written copy of the contract to Cole in Ohio,

where Cole himself ultimately executed it. *Id.* These facts support the Sixth Circuit's finding that Mileti purposefully availed himself of doing business in Ohio creating a sustained obligation to a resident of the state.

A claim may *arise* from the defendants' activity in the forum even if no proximate causal link exists between them. *Southern*, 401 F.2d at 384, n. 27. Instead, so long as the defendant's contacts with the state in some way "relate[ ] to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts." *CompuServe*, 89 F.3d at 1267; *see also Third Nat'l Bank v. WEDGE Group, Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990). These principles confirm the Sixth Circuit's determination that Cole's breach-of-contract claim *arose* from the negotiations and other activity that Mileti directed to Ohio.

Where the defendants have purposefully availed themselves of the privilege of doing business in the forum state, and where the plaintiff's claim arose from that activity, the law presumes that exercise of personal jurisdiction over the defendants will be *fair and reasonable* for purposes of "minimum contacts." *CompuServe*, 89 F.3d at 1268; *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988). Only "compelling" evidence can overcome this presumption. *Burger King*, 471 U.S. at 477. The record contains no evidence that satisfies this substantial burden.

The Sixth Circuit was correct in determining that due process permitted the district court to exercise personal jurisdiction over Mileti. Review by this Court could not result in any other conclusion.

C. THE SIXTH CIRCUIT'S APPLICATION OF THE OHIO LONG-ARM STATUTE PRESENTS AN ISSUE OF STATE LAW THAT DOES NOT MERIT THE COURT'S ATTENTION.

Even if "minimum contacts" exist, nonresident defendants become subject to personal jurisdiction in the forum state only if its long-arm statute covers the asserted claims. *Theunissen v. Matthews*, 935 F.2d 1454 (6th Cir. 1991). Ohio Rev. Code § 2307.382 permits litigation in Ohio on claims "arising from" the would be defendant's "transacting any business" in the state. OHIO REV. CODE ANN. § 2307.382(A)(1) (Banks-Baldwin 1988); *see generally Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St. 3d 73, 75, 559 N.E.2d 477, 480 (1990), *cert. denied*, 499 U.S. 975 (1991).

The Sixth Circuit dealt with this aspect of personal jurisdiction in summary fashion:

> Although the Ohio Supreme Court recently held that [§ 2307.382(A)(1)] does not reach to the limits of the Due Process Clause, ... our central inquiry is whether Mileti established certain minimum business contacts with Ohio.

133 F.3d at 436. Mileti argues that since the Ohio statute and the "minimum contacts" test do in fact differ, the Court should grant certiorari for purposes of remanding the case and requiring the Sixth Circuit to make a specific finding on the applicability of Ohio Rev. Code § 2307.382(A)(1). *See Petitioner's Brief*, pp. 12-13.

Courts have historically regarded the Ohio long-arm statute as extending to the outer reach of due process. *Preferred RX, Inc. v. American Prescription Plan, Inc.*, 46 F.3d 535, 550 (6th Cir. 1995); *accord*, *Records Deposition Serv., Inc. v. Henderson & Goldberg, P.C.*, 100 Ohio App. 3d 495, 499, 654 N.E.2d 382, 384 (Ohio Ct. App. 1995). This construction negates any possible need for remand, since the Sixth Circuit's finding of "minimum contacts" would necessarily establish personal jurisdiction under § 2307.382.

Goldstein v. Christiansen, 70 Ohio St. 3d 232, 638 N.E.2d 541 (1994), the Ohio Supreme Court case referenced by the Sixth Circuit, does not foreclose such a conclusion. *Goldstein* discusses the relative scope of the due process clause and § 2307.382 only in an aside that had no bearing on the disposition of the case. *See id.* at 238, 545-46, n. 1. As previously discussed, dicta of this kind carry no precedential weight. *See* p. 7, *supra*.

Whatever the import of *Goldstein*, the requirements of § 2307.382 in this particular action represent the kind of state-law matter that warrants the Court's review under only the most extraordinary of circumstances. *See* pp. 7-9, *supra*. The public interplay between the statute and the "minimum contacts" test also lacks the wide-ranging significance needed to invoke the discretionary jurisdiction of this tribunal. *See* pp. 9-10, *supra*. The Sixth Circuit's treatment of § 2307.382 creates no grounds for issuance of a writ of certiorari.

CONCLUSION

Mileti has failed to present any viable reason why the Court should review the decision entered by the Sixth Circuit Court of Appeals in this case. The Court should deny his Petition for Writ of Certiorari.

Respectfully submitted,

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1997

NICK J. MILETI,
PETITIONER,

v.

MARCIA N. COLE,
REPRESENTATIVE OF THE ESTATE OF
JOSEPH E. COLE,
REPONDENT.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

APPENDIX

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Copr. (C) West 1998 No Claim to Orig. U.S. Govt. Works

Not Reported in N.E.2d
(Cite as: 1990 WL 163829 (Ohio App. 5 Dist.)

NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

ASSOCIATES FINANCIAL SERVICES/APEX,
Plaintiff-Appellee,
v.
Teresa L. BROGAN, Defendant-Appellant.

No. 15-CA-90.
Court of Appeals of Ohio, Fairfield County.
Oct. 22, 1990.

Civil Appeal from Common Pleas Court, Case No. 89CV-MY-0198.

Louis P. Endres, Gayton, Tilton & Endres, Columbus, for plaintiff-appellee.
David L. Day, Terence L. Gallagher, David L. Day, L.P.A., Columbus, for defendant-appellant.

Before PUTMAN, P.J., and HOFFMAN and SMART, JJ.

OPINION
EXHIBIT B.
March 27, 1990.

JUDGMENT ENTRY

*1 This cause of action came on for hearing upon the Plaintiff's Motion for Summary Judgment and the Defendant's Motion for Summary Judgment as well as the memoranda and evidence of all the parties. Upon consideration of the motions, memoranda and evidence adduced and the affidavits of the parties, and for the reasons stated in this Court's memorandum dated February 27, 1990, the Plaintiff's Motion for Summary Judgment is sustained and Defendant's Motion for Summary Judgment is overruled.

It is therefore ORDERED, ADJUDGED and DECREED that Plaintiff Associates Financial Services/APEX is hereby granted judgment against Defendant Teresa L. Brogan in the amount of $36,862.21 plus interest at the rate of 10% from February 28, 1990. Costs taxed by the Clerk of Courts pursuant to statutory authority to be paid by Defendant.

Both parties have moved for summary judgment, defendant on the basis of a six- year statute of limitations effective in Colorado and plaintiff on the grounds that the Ohio limitation of fifteen years on written agreements is the appropriate statute. The only issue in the case is whether plaintiff's claim is barred by the Colorado statute.

Ohio has consistently applied the practically universal rule that limitations of actions are fixed by the laws of the state in which suit is filed rather than that in which a cause of action

arises. Alropa Corp. v. Kirchwehm (1941), 138 Ohio St. 30, 19 Ohio Opns. 484; Meekison v. Groschner, et al. (1950), 150 Ohio St. 301, 41 Ohio Opns. 298; McCormick v. Taft, Exr., et al. (1938), 61 Ohio App. 200, 12 Ohio Opns. 454; Barile v. University of Virginia (1986), 30 Ohio App.3d 190; Males, et al. v. W.E. Gates Associates, et al. (1985), 29 Ohio Misc.2d 13, 29 OBR 229. For many years General Code Section 11234 (later Revised Code 2305.20) provided that if the laws of a state where the cause of action arose barred an action, the action should be barred in Ohio. Were that statute still law, the defendant's motion might well be granted. However, the statute was repealed effective November 5, 1965, thus emphasizing the classic doctrine as Ohio law.

Notwithstanding the general rule applying limitations set by the law of the forum, defendant asserts that because the contract now in suit shall by its terms be governed by Colorado law, therefore the Colorado statute of limitations should apply as well. It is certainly true that unless prohibited by statute, parties to a contract may agree to set their own period of limitations for enforcement, especially if a shorter than that fixed by law is adopted. 66 O.Jur.3d, 169, paragraph 32 on Limitations and Laches; Appeal, Administrator v. Cooper Insurance Company (1907), 76 Ohio St. 52. See also annotation in 6 ALR3d 1197. However, in the majority of such contracts-- whether insurance policy, bill of lading or manifest--the shorter period is specifically mentioned in the agreement. The clause on which defendant relies in the case at bar is too general in its terms to include such a meaning; furthermore, it applies Colorado law only to the validity and effect of the defendant's obligation and not to its enforcement.

*2 THEREFORE, the court sustains the plaintiff's motion for summary judgment and overrules the defendant's motion for summary judgment.

Counsel for the plaintiff shall prepare a judgment entry accordingly, submit it to counsel for the defendant for approval and file it with the court within ten days.

Judge Joseph T. Clark

XC: Atty. Louis P. Endres, III
Atty. David L. Day

EXHIBIT A

IN THE COURT OF COMMON PLEAS OF
FAIRFIELD COUNTY, OHIO
CASE NO. 89 CV MY 0198

ASSOCIATES FINANCIAL SERVICES/APEX,
Plaintiff,
v.
TERESA L. BROGAN, Defendant.

Feb. 27, 1990.

MEMORANDUM

This cause of action came on for hearing upon the plaintiff and defendant's motions for summary judgment and after consideration of the memoranda of the parties, the court makes the following decision:

On July 13, 1978, Hearl Brogan, husband of defendant borrowed $20,106.38 from plaintiff to purchase a Chevrolet agency in Tallahassee, Florida. The note was apparently executed in Indiana where the Brogans then lived, but it carried the following clause: "Debtors jointly and severally agree--that the construction, validity and effect of this contract shall be governed by the laws of the state of Colorado and of the United States." The note was signed by defendant as well as her husband but the check for the loan was made to him alone.

Hearl's business venture was unsuccessful; the husband obtained a discharge in bankruptcy but the defendant did not. The Brogans ultimately made their way to Fairfield County, Ohio, where plaintiff has sued the wife only.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Fairfield County is reversed and, pursuant to App.R. 12(B), we enter final judgment in favor of defendant-appellant Teresa L. Brogan.

The analogous Ohio statute, R.C. 2305.06, enforces a 15 year statute of limitations. It is undisputed that the following provision is contained within the promissory note between appellant and Capital, Colorado Company:

Construction: Debtors jointly and severally agree that, "Debtor" and "Debtors" are interchangeable and include his or their heirs, successors, and assigns; that "Lender" includes

his or its heirs, successors, and assigns; and that the construction, validity, and effect of this contract shall be governed by the laws of the State of Colorado and of the United States. (Emphasis supplied.)

In determining that the Ohio statute controls, and not the Colorado statute, the court stated (referring to "Construction" cited supra):

The clause on which defendant relies in the case at bar is too general in its terms to include such a meaning; furthermore, it applies Colorado law only to the validity and effect of the defendant's obligation and not to its enforcement.

THEREFORE, the court sustains the plaintiff's motion for summary judgment and overrules the defendant's motion for summary judgment.

*3 It is settled that parties to a contract may choose the "forum law" which shall control. Jarvis v. Ashland Oil, Inc. (1985), 17 Ohio St.3d 189. As stated in Jarvis, where contracting parties have made such an "effective choice," a reviewing court will not embark upon a conflicts of law determination. At 192. That is what ensued at the trial level in the case sub judice. The common pleas court interpreted the subject provision, unambiguous on its face both as to meaning and reflecting the choice of the parties, as "too general" to be enforced. We find otherwise and state that the "construction, validity and effect" language contained within the contract squarely applies to the ultimate enforcement of the note as prosecuted herein.

Summary judgment should have been granted in favor of defendant-appellant herein. (See this court's judgment entry to that effect.)

For the reasons stated above, all three of appellant's assignments of error are sustained, and the judgment of the Court of Common Pleas is reversed.

PUTMAN, P.J., and SMART, J., concur.

HOFFMAN, Judge.

Associates Financial Services/APEX is plaintiff-appellee and Teresa L. Brogan is defendant-appellant.

On July 13, 1978, appellant and her husband Hearl Brogan together signed a promissory note in favor of Capital Financial Services in exchange for a loan of some $20,106. The loan agreement, executed in the state of Indiana, provided for complete repayment on or about June 13, 1982.

On January 25, 1979, Capital assigned the note to appellee Associates Financial Services/APEX (Associates). The last payment tendered by the Brogans to Associates was February 27, 1980.

No action of any consequence took place until May 22, 1989, when Associates filed its original complaint in the Court of Common Pleas of Fairfield County against Teresa Brogan only. (As determined by the trial court, Hearl Brogan had obtained a discharge in bankruptcy prior to the filing of the complaint. He was not a party to the action at trial nor is he one upon appeal.)

In her answer, Mrs. Brogan asserted the affirmative defenses of failure to state a claim and failure to comply with the appropriate statute of limitations, i.e., Colorado Rev. Statute 13-80-110, which carries a six (6) year statute of limitations in this situation. (A copy of the statute is attached to our memorandum-opinion.)

Brogan filed for summary judgment as did Associates. By Memorandum Decision filed February 27, 1990, trial court denied appellant's motion for summary judgment and granted that of Associates. (A copy of this memorandum is attached as is the court's judgment entry to this effect filed March 27, 1990.) Appellant now raises the following three assignments of error:

I. THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT-APPELLANT, TERESA L. BROGAN, AS NO GENUINE ISSUES OF MATERIAL FACT EXIST AND SHE HAS DEMONSTRATED ENTITLEMENT TO JUDGMENT AS A MATTER OF LAW.

*4 II. THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF-APPELLEE, ASSOCIATES FINANCIAL SERVICES/APEX, AS THERE WAS PRESENTED VALID AFFIRMATIVE DEFENSE TO ITS CLAIM.

III. THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF-APPELLEE, ASSOCIATES FINANCIAL SERVICES/APEX, AS THERE EXISTS A GENUINE MATERIAL ISSUE OF FACT AS TO AMBIGUOUS

LANGUAGE IN THE CONTRACT WHICH IS THE SUBJECT OF THIS ACTION.

I, II & III

We discuss all three assigned errors together.

Colorado Rev. Statute Sec. 13-80-110, cited supra and attached provides in pertinent part:

The following actions shall be commenced within six years after the cause of action accrues, and not afterwards:

(a) All actions of debt founded upon any contract....

(Emphasis added.)

Colorado Revised Statutes (3 Bound Volume)

EXHIBIT E

13-80-110. Actions barred in six years. (1) Except as otherwise provided in section 4-2-725, C.R.S.1973, the following actions shall be commenced within six years after the cause of action accrues, and not afterwards:

(a) All actions of debt founded upon any contract or liability in action;

(b) All actions upon judgments rendered in any court not being a court of record;

(c) All actions for arrears of rent;

(d) All actions of assumpsit, or on the case founded on any contract or liability, express or implied;

(e) All actions of waste and for trespass upon land;

(f) All actions of replevin, and all other actions for taking, detaining, or injuring goods or chattels;

(g) All other actions on the case, except actions for slander and for libel.

Source: R.S. p. 438, s 1; G.L. s 1671; G.S. s 2163; R.S. 08, s 4061; C.L. s 6392; CSA. C. 102, s 1; CRS 53, s 87-1-11; C.R.S.1963, s 87-1-11; L. 65, p. 1481, s 4.

I. General Consideration.
   A. In General.
   B. Waiver.
II. Applicable Actions.
   A. In General.
   B. Debt.
   C. Judgments of Courts not of Record.
   D. Contract.
   E. Waste and Trespass on Land.
   F. Replevin.
III. When Statute Begins to Run.
IV. When Running is Arrested.

I. GENERAL CONSIDERATION.

A. In General.

Cross references. As to necessity of affirmatively pleading the statute of limitations, see Rule 8(a), C.R.C.P. As to statute of limitations for contracts of sale, see s 4-2-725.

Law reviews. For article, "State Statutes of Limitation Contrasted and Compared", see 3 Rocky Mt.L.Rev. 106 (1931). For note, "Necessity for Filing Secured Claims in Bankruptcy Proceedings", see 3 Rocky Mt.L.Rev. 209 (1931). For article, "One Year Review of Agency, Partnerships, Corporations, and Municipal Corporations", see 41 Den.L.Ctr.J. 61 (1964). For note, "Rural Poverty and the Law in Southern Colorado", see 47 Den.L.J. 82 (1970).

This section is not a general or catch-all limitation statute. The six-year term there limited applies to the several categories of claims or cases therein mentioned. Board of Trustees of Policemen's Pension Fund v. Koman, 133 Colo. 598, 298 P.2d 737 (1956).

END OF DOCUMENT